

No. **77-1058**

Supreme Court, U. S.

FILED

JAN 25 1978

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

CAROL NUTTER,

Petitioner,

vs.

PERFECTO TORREZ d/b/a
PERFECTO PLUMBING AND
SEWAR SERVICE and WILLIAM
FURNACE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF KANSAS

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Table of Contents

Opinions Below-----	1
Jursidiction-----	2
Questions Presented-----	2
Statutes and Regulations Involved-----	3
Statement of the Case-----	8
Federal Question Raised-----	10
Argument for Allowance of Writ-----	11
Conclusion-----	12
Certificate of Service-----	13
Unpublished Memorandum of the Court of Appeals of the State of Kansas, <u>Nutter v. Torrez</u> , case number 48,534-----	Appendix "A"
Order of Supreme Court of the State of Kansas denying Petition for Review, <u>Nutter v. Torrez</u> , case number 48,534-----	Appendix "B"
Order of the Supreme Court of the State of Kansas dated October 26, 1977, denying Petition for Reconsideration, <u>Nutter v. Torrez</u> , case number 48,534-----	Appendix "C"
Letter of Dr. W. Wike Scamman-----	Appendix "D"

Affidavit of Dr. W. Wike Scamman-----Appendix "E"

Petition for Reconsideration of Order denying
Petition for Review, Nutter v. Torrez, case
number 48,534, in the Supreme Court of the
State of Kansas-----Appendix "F"

Table of Cases

<u>Department of State v. Pink</u> , 317 U.S. 264, 63 S.Ct. 233, 87 L.Ed. 254-----	11
<u>United States v. Adams</u> , 383 U.S. 39, 86 S.Ct. 708, 15 L.Ed.2d 572-----	11

Table of Statutes Cited

K.S.A. 60-256-----	3
28 U.S.C. §1257(3)-----	2, 11
28 U.S.C. §2101(c)-----	2

Table of Other Authorities

Kansas Appellate Rules 7.06-----	3
----------------------------------	---

United States Constitution,
Seventh Amendment----- 3

United States Constitution,
Fourteenth Amendment----- 3

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF KANSAS

TO: The Honorable, the Chief Justice and Associates
Justices of the Supreme Court of the United States:

Petitioner, Carol Nutter, prays that a
Writ of Certiorari be issued to review the judgment
order of the Supreme Court of the State of Kansas in
the above case on October 26, 1977.

A. Opinions Below

The official reports of the Kansas Appellate
court system pertaining to this action are case
number 48,534 in the Court of Appeals of the State of
Kansas, Nutter v. Torrez, unpublished memorandum
opinion, which is attached hereto and incorporated
herein as Appendix "A"; order of the Supreme Court
of the State of Kansas, case number 48,534, denying
Nutter's petition for review, which is attached hereto
and incorporated herein as Appendix "B"; and order
of the Supreme Court of the State of Kansas dated
October 26, 1977 in case number 48,534 denying Nutter's
petition for reconsideration of the previous order
denying Nutter's petition for review, and which is
attached hereto and incorporated herein as Appendix "C".

None of the opinions or decisions have been reported.

B. Jurisdiction

The date of the final judgment sought to be reviewed is October 26, 1977, which was entered on that same date, wherein the Supreme Court of Kansas denied Nutter's petition for reconsideration of the previous order denying review.

The date of the order denying rehearing by the Supreme Court was October 26, 1977. The date of the original appellate judgment by the Intermediate Kansas Court of Appeals was July 22, 1977.

The statutory provisions believed to confer jurisdiction on this Court to review the October 26, 1977 judgment and to grant certiorari to the Kansas Supreme Court is 28 U.S.C. §2101(c) and 28 U.S.C. §1257(3).

C. Questions Presented

The question presented for review in this petition, succinctly stated, is whether the Kansas Supreme Court acted improperly and denied

petitioner basic constitutional rights when the said Supreme Court refused to review and rehear and reconsider the Court of Appeals' decision when newly-discovered evidence had been presented indicating that summary judgment had been improperly granted and further clearly indicating that the sole basis of the Kansas Court of Appeals' decision no longer existed because of the newly-discovered evidence.

D. Statutes and Regulations Involved

The statutory provisions involved are K.S.A. 60-256; Kansas Appellate Rules number 7.06; Amendment Number 7 to the United States Constitution; Amendment Number 14 to the United States Constitution. Those statutes, amendments and regulations provide:

"A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of twenty (20) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting

affidavits for a summary judgment in the party's favor as to all or any part thereof.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

The motion shall be served at least ten (10) days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary,

the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the actions as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

Should it appear from the affidavits of a party opposing the motion that he or she cannot for reasons stated present by affidavit facts essential to justify his or her opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him or her to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt." (K.S.A. 60-256).

"A motion for rehearing or modification in a case decided by the Supreme Court may be served within twenty (20) days of the date of the decision. The issuance of the mandate shall be stayed pending

the determination of the issues raised by such a motion. If a rehearing is granted, such order suspends the effect of the original decision until the matter is decided on rehearing.

If no motion for rehearing is filed or upon denial of a motion for rehearing, the clerk of the appellate courts shall, unless the court otherwise orders, issue a mandate on the decision of the Supreme Court to the district court together with a copy of the opinion." (Kansas Appellate Rules number 7.06).

"In suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise examined in any Court of the United States, than according to the rules of the common law." (Amendment Number 7 to the United States Constitution).

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Amendment Number 14 to the United States Constitution).

E. Statement of the Case

In January of 1973, Carol Nutter's two year old son, Daina T. Nutter, died. Thereafter, Nutter commenced this wrongful death action against the Defendants, manufacturer and installer of a furnace in Nutter's home. Mrs. Nutter alleged that the Defendants have been negligent in both the manufacturing and installation of the furnace, and that the cause of her son's death was carbon monoxide poisoning from the furnace.

Following the small child's death, and pursuant to request of Nutter's family doctor, Dr. Antonoi Huaman, then the County Coroner for Shawnee County, Kansas performed an autopsy. The autopsy revealed pneumonia as the cause of death, and further specifically stated that the Coroner's findings were incompatible with carbon monoxide poisoning.

The trial court dismissed the action on summary judgment finding that the uncontroverted medical evidence (i.e., the autopsy report of Dr. Huaman) showed there was no causal connection between the alleged misconduct of the Defendants and the death of the child.

The case was appealed to the Kansas Court of Appeals. That Court affirmed the summary judgment, emphasizing the autopsy report which established that the cause of death was pneumonia and not monoxide poisoning, and basing their entire opinion on that autopsy report.

Mrs. Nutter thereafter asked the Kansas Supreme Court to review the Court of Appeal's decision, but that was declined on September 8, 1977. Thereafter, and on September 30, 1977, Mrs. Nutter, acting on her own, obtained a letter from the acting Coroner of Shawnee County, Kansas, W. Wike Scamman, stating in part: "I find it more probable that he died as a result of carbon monoxide and gas inhalation, rather than viral pneumonitis, as was indicated on the Death Certificate." The letter concluded: "Therefore, I will revise the Autopsy Diagnosis as well as the Death Certificate." A copy of said letter is attached hereto and incorporated herein as Appendix "D". Shortly thereafter, and on October 4, 1977, counsel for Nutter obtained an affidavit from Dr. Scamman to the same effect, and a copy of that affidavit is attached hereto and incorporated herein as Appendix "E".

Based upon such newly discovered evidence, Mrs. Nutter filed a Petition for Reconsideration in

the Kansas Supreme Court, setting forth the newly-discovered evidence, and attaching a copy of the letter of Dr. Scamman as well as the affidavit. On October 26, 1977, the Supreme Court of Kansas, without any type of opinion, denied that Petition.

F. Federal Question Raised

The federal question involved herein surrounding right to jury trial and the right to due process before deprivation of person and property, was not and could not have been raised until Nutter's Petition for Reconsideration of Order denying her petition for review was filed. A copy of that is attached hereto and incorporated herein as Appendix 'F'. The method of raising that federal question was by that pleading, pleading and assignment of error. Specifically, that pleading stated in pertinent part:

"It would be gross injustice to deny Mrs. Nutter her 'day in court' in this action because of an error on the part of a public official. It obviously is unjust to say to this appellant that she does not have the right to a jury trial because of a Death Certificate, when that exact same Death Certificate has been revised and amended as a matter of public record."

The raising of such federal question was timely because it was raised almost immediately when it was learned that the autopsy report was in fact being revised. Accordingly, there has been appropriately raised a question of rights and privileges under the United States Constitution, thus vesting jurisdiction in this Court pursuant to 28 U.S.C. §1257(3).

G. Argument for Allowance of Writ

First, Petitioner submits that this Writ is timely because it has been taken within ninety days after the entry of the October 26, 1977 judgment and decree. (See 28 U.S.C.A. §2101(c)). The ninety days could not have commenced on a federal question until that last order because the previous orders of the Kansas Appellate Courts had not concerned federal questions. Further, the clear and undisputed law of this Court is that the time for filing of a Petition for Certiorari runs from the date of an order overruling a motion to amend or alter or modify a previous judgment. (United States v. Adams, 383 U.S. 39, 86 S.Ct. 708, 15 L.Ed. 2d 572). This rule was also recognized in Department of State v. Pink, 317 U.S. 264, 63 S.Ct. 233, 87 L.Ed 254, where the Court held that a petition for rehearing tolled the running of the ninety day period for filing of certiorari because that petition operated to suspend the finality of the state court's judgment until the state court had decided whether the original judgment should be modified. Thus, there is no question but that the

ninety day time for filing of certiorari did not commence until the judgment of October 26, 1977, and therefore this petition is timely. The provisions set forth in Rule 19 of this Court as to considerations governing review on certiorari, is that a very substantial federal question has been raised. This Petitioner lost her son and now has lost her day in court without a jury trial or due process. Both law and equity require that she be allowed to have this Court consider her plight and remand this action to the appropriate trial court in Shawnee County, Kansas for determination on the merits. It is not in accord with other appropriate and applicable decisions of this Court to deny litigants their right to a day in court, jury trial, and due process.

H. Conclusion

Petitioner prays that the relief requested herein be granted for the reasons previously stated.

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ATTORNEYS FOR PETITIONER.

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Rules of the United States Supreme Court, the undersigned hereby certifies and indorses that three copies of the above and foregoing Petition for Writ of Certiorari to the Supreme Court of Kansas was served on counsel for all parties concerned, by placing such copies in a United States mailbox, with first class postage prepaid, addressed to counsel of record at their post office address as follows:

James Benfer, Esq., 1400 Topeka
Boulevard, Post Office Box 2217,
Topeka, Kansas 66601, Attorney for
Perfecto Torrez, d/b/a Perfecto
Plumbing and Sewar Service, Incorporated; and,

Michael J. Schenk, Esq., 810
Merchants National Bank Building,
Topeka, Kansas 66612, Attorney for
William Furnace Company.

Such certification is made pursuant to
Rule 33(1) and 3(b).

Certification is further made that such mailing occurred on the 23rd day of January, 1978. Further, pursuant to Rule 21(3) of the Rules of this Court, 40 copies of this petition were mailed, air mail, special delivery, postage prepaid, to the Clerk of the United States Supreme Court, on the 23rd day of January, 1978.

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By: Fred W. Phelps, Jr.
FRED W. PHELPS, JR.

APPENDIX "A"

No. 48,534

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CAROL NUTTER,
Appellant,

v.

PERFECTO TORREZ,
d/b/a PERFECTO PLUMBING AND SEWER SERVICE, INC.,
and WILLIAMS FURNACE COMPANY,
Appellees.

MEMORANDUM OPINION

Appeal from Shawnee district court, division No. 1;
WILLIAM RANDOLPH CARPENTER, judge. Opinion filed July 22,
1977. Affirmed.

Harold E. Doherty, of Topeka, for the appellant.

George Farrell, Jr. and David L. McLane, of Topeka,
for Perfecto Torrez, appellee.

Michael J. Schenk and Herbert A. Marshall, of
Marshall, Hawks, McKinney & Hendrix, of Topeka, for Williams
Furnace Company, appellee.

Before SWINEHART, P.J., REES and PARKS, JJ.

PARKS, J.: The plaintiff, Carol Nutter, mother of the
decedent, Daina Torbert Nutter, filed a wrongful death action
against the defendant Williams Furnace Company, the manufacturer

of a furnace, and the defendant Perfecto Torrez d/b/a Perfecto
Plumbing and Sewer Service, Inc., who allegedly installed the
furnace in plaintiff's home. The plaintiff alleged that the
defendants were negligent in the manufacture and installation
of the furnace and that the cause of her son's death was carbon
monoxide poisoning.

The pertinent facts are: On the morning of January
17, 1973, Carol Nutter found her son dead in his bed. Dr.
Robert Parman, the family pediatrician, was called to the home
and pronounced the child dead. Dr. Parman questioned the family
in reference to possible drug ingestion, trauma or carbon
monoxide poisoning, but as far as the family knew at that time,
there were no problems involved in any of these areas. Dr.
Parman raised the question about carbon monoxide poisoning
because he noticed a wall furnace in the room where the child
had been sleeping. Dr. Parman expressed his concern to the
county coroner, Dr. Huaman, who performed an autopsy the following
day. The autopsy revealed congestion and condensation of both
lungs suggestive of viral pneumonitis. The microscopic
examination revealed changes of influenzal pneumonia. Dr.
Huaman commented in his autopsy report that the gross findings
and the gross appearance of the blood were incompatible with
carbon monoxide poisoning and therefore no chemical tests were
performed on the blood.

Both defendants filed a motion for summary judgment.
The trial court sustained the motions, stating in part:

"The uncontroverted medical evidence
of defendants discloses that there is no causal
connection between alleged conduct of defendants
and the death of the child in question. Plaintiff
has failed to show any competent medical evidence

which would establish her claim and contradict the medical discovery of said defendants."

Plaintiff appeals from this adverse ruling.

We will first consider plaintiff's contention that the court erred in holding as a matter of law that there was no question of fact as to the proximate cause of the child's death.

Where the sole question presented is one of law, a final determination may be had on a motion for summary judgment. Wagner v. Mahaffey, 195 Kan. 586, 408 P. 2d 602. A motion for summary judgment should be sustained only where there is no genuine issue of material fact, and a party is entitled to judgment as a matter of law. Mildfelt v. Lair, 221 Kan. 557, 559, 561 P. 2d 805; Harold v. Harold, 218 Kan. 284, 543 P. 2d 1019.

It may be said that an issue of fact is not genuine unless it has legal controlling force as to a controlling issue. A disputed question of fact which is immaterial to the issues does not preclude summary judgment. If the disputed fact, however resolved, could not affect the judgment, it does not present a genuine issue of a material fact. It has been said that before summary judgment is granted the court must be convinced that the issue is not genuine, or that there are only immaterial or imaginary factual issues. Secrist v. Turley, 196 Kan. 572, 412 P. 2d 976.

Here, we have the coroner's report giving the final diagnosis and cause of death as influenzal pneumonia; and a clarification of that diagnosis that since the gross findings and appearance of the blood were incompatible with carbon monoxide poisoning, no chemical tests were performed. The only

medical expert designated by plaintiff in her answer to interrogatories as one who would testify contrary to the coroner's report, was Dr. Parman. However, Dr. Parman stated that he had no opinion of the cause of death which he could express with any degree of medical certainty other than that listed in the coroner's report.

Inasmuch as the cause of death is the gravamen of plaintiff's claim, we agree with the trial court that there is no genuine issue of material fact as to either the causal connection between the acts of the defendants and the death of the child, or the cause of death itself. There was no indication of evidence reaching the degree of reasonable medical probability that the death resulted from carbon monoxide poisoning. Nunez v. Wilson, 211 Kan. 443, 507 P. 2d 329. The coroner's report was the only medical evidence which could be expressed with any degree of medical certainty. Accordingly, we must conclude that the trial court was correct in granting its order of summary judgment.

Plaintiff next contends that the trial court erred in refusing to reconsider its previous ruling. The following excerpt is taken from the court's letter in response to an inquiry by plaintiff's counsel concerning the Memorandum Decision filed May 28, 1976:

"It should be noted that the Court carefully considered plaintiff's memorandum and correspondence attached thereto, as well as the arguments of counsel. The Court concluded as set forth in the Memorandum Decision that the previous ruling sustaining the defendants' motion for summary judgment should not be disturbed."

In our opinion this statement disposes of the second statement of points raised by the plaintiff.

The judgment is affirmed.

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 48,534

CAROL NUTTER,
Appellant,

v.

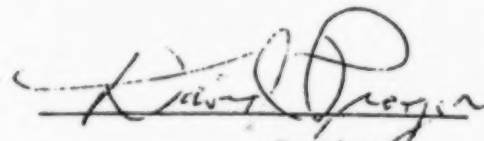
PERFECTO TORREZ, d/b/a PERFECTO
PLUMBING and SEWER SERVICE,
INCORPORATED, and WILLIAM FURNACE
COMPANY,
Appellees.

O R D E R

The petition for review in the above captioned
case is considered and denied. The opinion of the Court of
Appeals filed July 22, 1977, is approved.

Dated September 8, 1977.

For the entire court.


Justice

RECEIVED

OCT 4 1977

FRED W. PHELPS, ESQ.

APPENDIX "C"

IN THE SUPREME COURT OF THE STATE OF KANSAS

Carol Nutter, Appellant,

Perfecto Torres, d/b/a Perfecto
Plumbing and Sewer Service, Inc.
et al., Appellees.

No. 48,534

APPENDIX 'D'

You are hereby notified of the following action taken in the above entitled case:

Petition for reconsideration of order denying Nutter's
Petition for Review.

Petition for reconsideration DENIED.

Date October 26, 1977

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

RECEIVED

OCT 28 1977

FRED W. PHELPS, ESQ.

BEST COPY AVAILABLE



THE LATTIMORE-FINK LABORATORIES, INC.
A BANCOR LABORATORY 115 WEST CRANE

TOPEKA, KANSAS 66603

September 30, 1977

Mrs. Carol Nutter
1422 Munson Street
Topeka, Kansas

Dear Mrs. Nutter:

On reviewing the circumstances surrounding the death of your son Daina Torbert Nutter, on January 17, 1973, and reviewing the Gross Description and Microscopic Sections of the Autopsy, I find it more probable that he died as a result of carbon monoxide and gas inhalation, rather than viral pneumonitis, as was indicated on the Death Certificate.

The sections of the lungs show marked edema along with an area of hemorrhage with practically no inflammation present. With a viral pneumonitis, I would expect to find at least a mild inflammatory infiltrate.

Therefore, I will revise the Autopsy Diagnosis as well as the Death Certificate.

Yours truly,

W. Wike Scamman, M.D., Coroner

LATTIMORE-FINK LABORATORIES, INC.

WWS:et

APPENDIX 'E'

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 48,534

CAROL NUTTER,
Appellant,

v.

PERFECTO TORREZ, d/b/a PERFECTO
PLUMBING AND SEWER SERVICE,
INCORPORATED, and WILLIAM FURNACE
COMPANY,
Appellees.

A F F I D A V I T

STATE OF KANSAS :
 :SS
COUNTY OF SHAWNEE :

The undersigned, of lawful age, and being first duly
sworn upon his oath, deposes and says:

1. That he is a medical doctor and coroner;
2. That he recently has reviewed the circumstances sur-
rounding the death of Daina Torbert Nutter on January 17, 1973,
and in so doing has reviewed the Gross Description and Microscopic
Sections of the Autopsy performed on Daina Torbert Nutter, and base
on such review his opinion is that it is more probable that Daina
died as a result of carbon monoxide and gas inhalation, rather than
viral pneumonitis, as is indicated on the Death Certificate.

3. The medical reason for his opinion is that the lungs
showed marked edema along with an area of hemorrhage with practical
ly no inflammation present. Had there been a viral pneumonitis,

there would have been at least a mild inflammatory infiltrate,
which there was not.

4. That because of his opinion and review of the records
as described above, he will revise the Autopsy Diagnosis as well
as the Death Certificate to reflect the above.

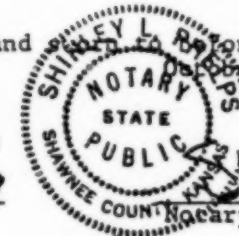
5. Further affiant saith not.

W. Wike Scamman, M.D.
W. WIKE SCAMMAN, M.D.
Coroner

Subscribed and sworn to before me this 4th day of
December, 1977.

My Commission expires:

December 24, 1979



Shirley L. Phelps
Notary Public

APPENDIX 'F'

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 48,534

CAROL NUTTER,
Appellant,

FILED

OCT 4 - 1977

LEWIS C. CARTER
CLERK APPELLATE COURTS

v.

PERFECTO TORREZ, d/b/a PERFECTO
PLUMBING and SEWER SERVICE,
INCORPORATED, and WILLIAM FURNACE
COMPANY,
Appellees.

PETITION FOR RECONSIDERATION OF ORDER
DENYING NUTTER'S PETITION FOR REVIEW

Comes now the appellant above-named, Carol Nutter, and moves this court to reconsider its order of September 8, 1977 whereby Nutter's Petition for Review was denied.

In support hereof, appellant shows the court that summary judgment was granted in this action at the trial level solely because of an uncontroverted coroner's report and death certificate, which report indicated that Nutter's deceased son could not possibly have died from gas inhalation. Likewise, the Kansas Court of Appeals affirmed that summary judgment because of that uncontroverted report and certificate. Your petitioner further assumes that this court declined to grant review of this matter because of that uncontroverted report.

Appellant now shows this court that a recent report from W. Wike Scamman, M.D., Coroner, has reviewed certain portions of the autopsy

performed on Nutter's deceased son, and based on that review, finds it "more probable that he (the deceased son) died as a result of carbon monoxide and gas inhalation, rather than viral pneumonitis, as was indicated on the Death Certificate." Because of Dr. Scamman's review of the Death Certificate, and his opinion as to its error, he is going to revise the Autopsy Diagnosis as well as the Death Certificate. (See attached letter of Dr. Scamman.) Dr. Scamman has also executed an affidavit in this regard, which is attached hereto and incorporated herein by reference.

Thus, the public records indicating the cause of your appellant's son's death will indicate that the death was most probably caused by carbon monoxide and gas inhalation. It would be gross injustice to deny Mrs. Nutter her "day in court" in this action because of an error on the part of a public official. It obviously is unjust to say to this appellant that she does not have the right to a jury trial because of a death certificate, when that exact same death certificate has been revised and amended as a matter of public record.

WHEREFORE, your appellant prays that this court reconsider its decision of September 8, 1977 whereby appellant's Petition for Review was denied, and that this court enter a judgment reversing the trial court's granting of summary judgment and remanding this case to the District Court level for jury trial.

Respectfully submitted,

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By:

FRED W. PHELPS, Jr.
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a conformed copy of the above and foregoing "Petition for Reconsideration of Order Denying Nutter's Petition for Review" was regularly mailed on this 4th day of October, 1977, to:

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Herbert A. Marshall, Esq.
and
Michael J. Schenk, Esq.
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By:

FRED W. PHELPS, Jr.
Attorney for Plaintiff